Nos. 9994 and 9995

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

THE CITIZEN NEWS COMPANY, Respondent.

ON PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENORS, LOS ANGELES NEWSPAPER GUILD AND LEONARD LUGOFF

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17 Appeal Printing Co., Inc., 130 Cedar St., New York - WO 2-3242

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Authorities Cited

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Order Permitting Intervention

Pursuant to order of this Court, the intervenors have been permitted as interested parties, to file a brief in support of the petition of the National Labor Relations Board for enforcement of its orders against the respondent.

Summary of the Cases

Two petitions of the National Labor Relations Board are before this Court for enforcement.

The first (9994) seeks enforcement of the Board's order directing the respondent to cease and desist from "interfering with, restraining, or coercing its employees in the exercise of the right * * * to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing * * *" pursuant to Section 7 of the National Labor Relations Act (R. 148).

The second (9995) seeks enforcement of an order directing the respondent to cease and desist, as above stated, and from discouraging membership in the Los Angeles Newspaper Guild, from discriminating in regard to hire and tenure of employment of any of its employees, and to reinstate Leonard Lugoff, whom the Board found had been discharged because of union activity (R. 117).

The respondent, a California corporation, publishes a daily newspaper in Hollywood known as the Citizen-News, as well as other publications, and operates a job printing service (9994, R. 170).

Questions Presented

Upon these petitions for enforcement, four questions are presented. They are:

1. Whether the business conducted by the respondent bears a close and intimate relation to interstate commerce and whether an unfair labor practice of the respondent affects such commerce.

2. Whether the Board's orders, which are sought to be enforced (9994, R. 146-150; 9995, R. 115-120) would deprive respondent of freedom of speech and press under Amendment I to the Constitution of the United States.

3. Whether such orders which require the respondent to post notices stating that it will cease and desist as

hereinabove indicated, violate the due process clause of Amendment 5 to the Constitution of the United States.

4. Whether the Board's orders are based upon substantial evidence.

Conceded Facts

The Los Angeles Newspaper Guild had been designated as the representative of the editorial employees of the Citizen-Union for the purpose of collective bargaining with respondent (9994, R. 6, 17).

Respondent's publications are circulated entirely within the State of California, except that the Citizen-News, whose daily circulation is in excess of 26,000, sends about 125 daily copies outside the State (9994, R. 170-172; 9995, R. 2-3, 9).

Respondent imports from outside the state 350 tons of newsprint a week (9994, R. 216; 9995, R. 3, 9, 134). The cost of this newsprint constitutes 20% of the total expenses of all of the respondent's publications (9994, R. 219; 9995, R. 3, 9).

The Associated Press and the United Press service the Citizen-News. Both services together supply out-of-state news to the extent of 21% of the paper's total reading matter, although such out-of-state news is received through the California offices of both news services (9994, R. 173-174, 181, 183-184, 188-190; 9995 R. 2, 9).

Eleven feature syndicates supply about 17% of the paper's total reading matter, all of which comes from outside the state (9994, R. 191-193, 228; 9995, R. 2, 9).

With the qualification that Associated and United Press news comes through the California offices of these agencies, the Citizen-News contains daily about 38% of

out-of-state news. This material is received by wire, teletype, wireless and mail (9994, R. 173-174, 181, 183-184, 188-190; 9995, R. 2, 9).

The Associated Press has the privilege of using any other news appearing in respondent's paper, and of transmitting such news through its California office to out-of-state points (9994, R. 176, 180-181; 9995, R. 2, 9).

About 10% of respondent's advertising revenue, which represents more than 5% of its total revenue, comes from advertising originating outside the State of California (9994, R. 197; 9995, R. 2, 9). A list of advertisers is contained at 9994, R. 206-208.

ARGUMENT

POINT I

The business conducted by respondent has a close, intimate and substantial relation to trade, traffic and commerce among the several states; and a labor dispute in respondent's business may lead or tend to lead to an obstruction of, or to the free flow of such commerce.

It is not the kind of business, nor the manner of its operation, which determines whether such business has a close or substantial relation to interstate commerce. The determining factor is the effect, if any, which a business may have upon commerce. Put another way, it is the effect upon interstate commerce, not the source of the injury, which is the criterion. *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197. An analysis of respondent's business, in the light of this rule, demonstrates that

the obtaining of reading matter and advertising, the purchase of newsprint and other supplies, makes interstate commerce indispensable. Conversely, if respondent's business were to suffer a labor dispute, the free flow of such commerce might be obstructed.

The respondent's position appears to be that interstate commerce is not involved, principally because its business is not an essential part of a "flow" of such commerce, because the out-of-state circulation of the Citizen-News is infinitesimal, and finally because editorial employees, who are involved in this case, are too remote from any interstate activity to have any direct relation with it. The first argument is based upon the fact that Associated and United Press news, even if originating out of the state, "comes to rest" in the respective California offices of those services, and then is sent out from those offices to the respondent, and upon the reverse of this fact as well (9995, R. 2, 9, 132-133, 134-135).

Such an essential "flow" of commerce as would exist, were Associated and United Press news to be transmitted to respondent from one or more points outside the state of California, is not necessary for federal concern over respondent's conduct of its business.

> "The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious actions springing from other sources." *Labor Board* v. *Jones Laughlin Steel Corp.,* 301 U. S. 1.

This rule was followed in *Labor Board* v. *Fainblatt,* 306 U. S. 601, 607, where the evidence disclosed that the

respondent, engaged in processing clothes in New Jersey, received cloth from a dress firm in New York. After making the garments, they were delivered in New Jersey to an agent of the dress firm, who in turn shipped them to New York. Fainblatt had nothing to do with the interstate movement of either the goods or the finished dresses. The Supreme Court held that even though an employer is not himself engaged in interstate commerce, he may be subject to the National Labor Relations Act.

The question is not, does the respondent engage in interstate commerce when it receives news from the California offices of the Associated or United Press, even if such news had reached those offices from outside the state. The question is, rather, what effect would a labor dispute in respondent's business have upon commerce? The transmission of news among the states is commerce within the meaning of the Constitution. *Associated Press* v. *N.L.R.B.*, 301 U. S. 103. There is no distinction between the transmission of news (*Associated Press* case, *supra*) and the receipt of such news by an individual newspaper. *N.L.R.B.* v. *A. S. Abell Co.*, 97 Fed. 951.

It seems logical, therefore, to conclude that a stoppage of work at respondent's plant, whether in the mechanical or editorial department, would interrupt the receipt of news sent out through interstate channels. It can make no difference in the effect of such a stoppage, if the news goes through the hands of a third party within the state.

This distinction which respondent advances, ignores the existence of an actual "flow" of commerce. The distinction also ignores the fact that the respondent's newspaper is a "feeder" for the Associated Press, which has the right to take any news item from respondent's paper and send it to any part of the United States or to any

part of the world. Therefore, the Citizen-News is a direct vehicle for the "flow" of news. Newsprint comes by water and truck from Canada directly to respondent. Syndicated articles and comic strips come directly by mail or express (9994, R. 193) from New York; Philadelphia; and Des Moines, Iowa. National advertising comes by mail from respondent's national advertising agent in Chicago (9994, R. 208, 210-211), and this agent's commission checks are mailed to Chicago (R. 213, *ibid*).

A similar situation existed in *N.L.R.B.* v. *A. S. Abell Co.*, 97 Fed. 951 (4th Circuit), and in *N.L.R.B.* v. *W. R. Hearst, et al.*, 102 Fed. 658 (9th Circuit), where it was held that such activities constitute interstate commerce.

Is there any logic in the second distinction, namely, that editorial employees are too remote from interstate commerce to affect it in any way? The argument was advanced in *Associated Press* v. *N.L.R.B.*, 301 U. S. 103.

In discussing editorial employees in this connection, Mr. Justice Roberts stated:

> "We think, however, it is obvious that strikes or labor disturbances amongst this class of employees would have as direct an effect upon the activities of the petitioner as similar disturbances amongst those who operate the teletype machines or as a strike amongst the employees of telegraph lines over which petitioner's messages travel."

Finally, there is respondent's contention that its business is local, and that the number of copies of the Citizen-News which circulate outside the State of California is negligible. This fact standing alone might be conclusive for such argument. Coupled, however, with respondent's direct activities in interstate commerce, the argument becomes untenable. It was so found in *The Press Co. Inc.*

v. *N.L.R.B.,* 118 Fed. 937 (U.S.C.A., Dist. of Col.), certiorari denied 313 U. S. 595; and in *Fleming* v. *Lowell Sun Co.,* 36 Fed. Supp. 320 (D. C. Mass.) (rev. on other grounds, 120 Fed. (2d) 213), aff'd 314 U. S., where the Court held:

> "* * * However, the percent or number of newspapers of the respondent that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states. It is common knowledge that the instrumentalities of interstate commerce are used and affected by every newspaper in gathering and publishing news and preparing the newspaper for circulation in and out of the state in which it is published."

In *Santa Cruz Packing Co.* v. *N.L.R.B.,* 91 Fed. (2d) 790 (C. C. A. 9), affd. 303 U. S. 453, 464, 467, it was held that in view of the interstate commerce actually carried on by the petitioner, the fact that all its grown fruits were sold within the State of California, was of no consequence in determining that the petitioner was engaged in interstate commerce.

> "* * * The existence of a continuous flow of commerce through the State may indeed readily show the intimate relation of particular transactions to that commerce."

> "* * * (p. 467) There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialetic of suggesting doubtful and extreme cases."

POINT II

The Board's orders directing the respondent to cease and desist from discouraging membership in the Los Angeles Newspaper Guild or from interfering in any manner with its employees in the exercise of their right to self-organization does not deprive it of freedom of speech or freedom of press under Amendment 1 to the Constitution of the United States.

The business of publishing a newspaper is not immune from regulation simply because it is the "press". As was held by Mr. Justice Roberts in *Associated Press* v. *N.L.R.B.*, 301 U. S. 103, 105:

> "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others * * *."

It is strange indeed that immediately any attempt is made by legislation to regulate business, if such regulation affects newspapers, the cry of "freedom of the press" is raised with crocodile tears. The insincerity of this cry, which takes the form of complaining that the proposed regulation destroys the liberty of the publishers to publish the news impartially, is manifested by the case of *Fleming* v. *Lowell Sun Co.*, 36 Fed. Supp. 320 (D. C. Mass.), reversed on other grounds 120 Fed. 2d 213, affd. 314 U. S. . In that case the cry of freedom of the press was raised against regulation by the Minimum Wage Laws. The Court took no heed of that contention. Extension of union organization into the newspaper industry has resulted in none of the horrible effects upon

editorial policy nor upon news material itself, which publishers have invariably and consistently bemoaned. Their opposition to regulation was fathered in past cases and is fathered in this case, by purely selfish motives.

How news can be distorted to suit an employee's bias, or in what manner an employee might be caused to distort a publisher's editorial policies, simply because he is protected by the Wages and Hours Act, is something the imagination fails to grasp. If bias exists on the part of any employee of a newspaper publisher, or rather if such employee has a bias contrary to that of his employer, the application of the Wages and Hours Act or the application of the National Labor Relations Act will not affect it one way or the other.

In the instant case there is not a shred of evidence in either record pointing to bias, distortion of news or opposition to editorial policies on the part of any employee in the editorial department, including the discharged employee, Lugoff. Nor is there any claim that because of union affiliation, any employee would be likely to show bias in the future.

This aspect of newspaper regulation was dealt with exhaustively by Mr. Justice Roberts in the *Associated Press* case (*supra*), when he said (p. 106):

> "We think the condition not only has no relevancy to the circumstances of the instant case, but is an unsound generalization * * *."

(p. 107)

> "* * * The regulation here in question has no relation whatever to the impartial distribution of news. The order of the Board in no way circumscribes the full freedom and liberty of the peti-

> tioner to publish the news as it desires it published, or to enforce policies of its own choosing with respect to the re-writing of news it publishes, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt."

See also:

Near v. *Minnesota,* 283 U. S. 697, 713.

The real opposition in this case, as in other cases where the cry of freedom of the press is raised, stems from something more than feigned fear of the wolf. It stems from simple opposition (which is in itself one of our basic rights) to governmental regulation of business in any form, shape or manner, and from a desire to continue exploitation and interference with the employees' rights of organization. Of course, to oppose the Board's order in the instant case on such basis would avail respondent nothing; consequently other real or imaginary weapons must be used. Aside from an attack upon the absence of substantial evidence to support the Board's orders, which will be discussed later, there is no other real weapon with which to oppose the jurisdiction of the National Labor Relations Board. The *Associated Press* case (*supra*) once and for all has disposed of the false cry that freedom of the press is in danger. There is no justification for the insincere use of one of our most precious rights as a battle cry against enlightened legislation. The respondent's plea must be recognized as a camouflaged device to seek immunity for a business enterprise, and not as a protection for a vehicle of opinion.

POINT III

No contravention of the due process clause of the Constitution is involved in that part of the Board's order which requires the respondent to post notices stating that it will cease and desist from the violations found by the Board to have occurred.

Respondent objects to such part of the Board's order in case 9994 as directs the posting of a notice stating that respondent will "cease and desist in the manner aforesaid" (R. 148, 157).

It objects also to the direction for posting in case 9995 which requires it to state "that the respondent will not engage in the conduct from which it is ordered to cease and desist * * *" (R. 118, 127).

Both objections are based upon the contention that such requirements for posting, if enforced, would compel the respondent to admit or at least imply that it has heretofore engaged in an unfair labor practice, which would be a confession of violation of law. This, it is claimed, the Board has no power to do, as it is in contravention of Amendment 5 to the Constitution.

It is to be noted that the language in case 9995 requiring posting, differs from the language in case 9994. Prior to *N.L.R.B.* v. *Express Publishing Co.,* 312 U. S. 426, the Board's orders required posted notices to announce that respondents would "cease and desist" from violations as found. In that case, however, an attack similar to that in the instant case, was made upon such requirement, on the ground that it required the respondent to confess violation by such announcement.

The force of such argument was recognized, and the Board consented to amend that part of the order to provide that the posted notice state that the respondent:

> "will not engage in the conduct from which it is ordered to cease and desist as aforesaid."

This is exactly the same language as used in the posting order in case 9995 (R. 118), and which was approved by the Court in the *Express Publishing* case (*supra*).

Unquestionably the Board will consent to a similar modification in case 9994. Therefore it remains only to discuss the Board's power to require the posting of notices. Upon that point, Mr. Justice Roberts held *N.L.R.B.* v. *Express Pub. Co.,* 312 U. S. 426, 438:

> "We have often held that the posting of notices advising the employees of the Board's order and announcing the readiness of the employer to obey it, is within the authority conferred on the Board by sec. 10 (c) of the Act 'to take such affirmative action * * * as will effectuate the policies' of the Act. See *N.L.R.B.* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 268; *H. J. Heinz Co.* v. *N.L.R.B.* (*supra*)" (311 U. S. 514).

There is thus no valid basis for respondent's argument that the requirement for posting notices in the form required in case 9995, violates any Constitutional rights of the respondent.

POINT IV

There is substantial evidence in both records to support the Board's findings that the respondent interfered with its employees' right to self-organization for the purpose of collective bargaining; discouraged membership in the Los Angeles Newspaper Guild; and discharged Leonard Lugoff because of his union membership and activity.

Where findings of fact are supported by substantial evidence, this Court is bound by such findings. *Appalachian Electric Power Co.* v. *Labor Board* (U.S.C.C.A. 4th Cir.), 93 F. (2d) 985. "Substantial evidence" is evidence furnishing a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington, Virginia and Maryland Coach Co.* v. *N.L.R.B.*, 301 U. S. 142.

An examination of the records compels the conclusion that, in each case, substantial evidence justifies the Board's findings and order based thereon.

Case 9994

In this case the Board found that the respondent had violated section 7 of the N.L.R.A. by interfering with, restraining and coercing its employees in the exercise of their rights to bargain collectively and to join labor organizations of their own choosing (R. 135).

The record discloses a consistent attitude of opposition on the part of Harlan G. Palmer, president of the respondent corporation, to any kind of concerted activity on the part of respondent's employees, directed toward improvement of working conditions. Prior to formation

of the Los Angeles Newspaper Guild, eight editorial employees attempted to negotiate working conditions and salaries with Palmer (R. 234). The evidence discloses that instead of one conference for eight, there occurred eight individual discussions with Palmer, each a pleasant discussion, dominated by Palmer who avoided the subject of salaries (R. 234, 263). The separate interviews came about as follows, to quote the uncontradicted testimony of Elizabeth Yeaman. Originally in June, 1936, a joint petition of those eight employees had been sent in to Palmer. His response was a bulletin board notice inviting every employee, if he wished, to discuss salary readjustments with him (R. 262-263). The eight individual conferences followed, which touched apparently on every conceivable subject but salaries (R. 264).

In July, 1936, when some routine raises came through, Young, respondent's business manager, told Roger Johnson, one of the eight, that Palmer "was averse to taking action under suggestions from pressure groups" (R. 243, 265). Young was not called to testify; nor did Palmer, who testified at length, deny it.

Also about July, 1936, "Office Gossip" a mimeographed house organ appeared with a call to all employees to register individual complaints with department heads. It also contained an invitation to dissatisfied employees to seek other employment (R. 265).

In September, 1936, the Guild was organized. Johnson became its first president (R. 237). A month later a unit of the Guild was organized among the respondent's editorial employees with the knowledge of Palmer and other supervisory employees (R. 237-238).

From then on, there occurred a series of events, each perhaps in itself not sufficient to establish Palmer's resent-

ment and opposition to the employees' collective activity, but which, together, and in the light of his admitted resistance to "pressure groups", form a pattern of active hostility to the Guild.

Johnson testified that at first flattery, then subtle bribery was used upon him. He delivered a radio talk, at the suggestion of his managing editor, Swisher, in aid of Palmer's political campaign (R. 237-238). At Swisher's suggestion Johnson was introduced as president of the Los Angeles Newspaper Guild (R. 273). Early in 1937 Palmer's sister suggested to Johnson that the Guild might not be necessary on the Citizen-News (R. 245), and Johnson disputed it (R. 246). About the same time, Wynn, assistant business manager, questioned Johnson about Guild plans for a contract and suggested that the union was paying "too much attention to the economic phases" (R. 246, 398). Later Swisher questioned the Guild's affiliation with the C.I.O. (R. 247). Then Young, the business manager, questioned Johnson about Guild organization of the business department (R. 247). Subtle bribery was tried by Young, when he intimated that if Johnson would quit the Guild, he might be promoted to an executive position (R. 248). In July, Brandon, head of the display advertising department, questioned the appropriateness of a union for "temperamental" newspaper people (R. 249).

In the spring or summer of 1937, after the editorial department Guild unit had been organized, a meeting was held between Palmer and employees of the department (not as a Guild unit) (R. 249). At that meeting Palmer attempted to destroy the unit by pressing for a *department* contract (R. 272-274, 398-400). He was seeking separate agreements with each department (R. 249-252).

In October, 1937, an organizational drive began in Brandon's department. He tried to be admitted to the Guild, but was rejected, as he was a department head (R. 252-253). That same month, the display advertising department employees were ordered to work Saturday (R. 255), although no advertising could be sold on that day (R. 255). Young admitted in effect to Johnson, that Brandon had ordered the Saturday work through spite (R. 255-256) and the uncontradicted testimony of Schlichter corroborates this (R. 375). The order was rescinded after a few weeks.

None of the supervisory employees mentioned so far in this narrative, was produced as a witness by respondent. These events stand uncontradicted.

At least one of the eight editorial employees, Elizabeth Yeaman, felt that the statement and warning in "Office Gossip" was:

> "* * * the result of eight of us in our naive wish to earn some more money having, perhaps, tread upon his toes in presenting a joint petition for some more salary" (R. 271).

A better example of coercion is difficult to imagine.

Then there is the testimony of Karl von Vetler Schlichter, an employee of the business department, under Young and Brandon (R. 276-282). His testimony was uncontradicted.

Some time after June, 1937, after Schlichter had joined the Guild, the manager of the classified advertising department said to him that he (the manager) "thought that the editorial workers were making a serious mistake to attempt to get higher wages * * * and that * * * the judge (meaning Palmer) will never sign a union con-

tract" (R. 278). Brandon, at meetings of the display salesmen, would often devote the meetings to denunciations of unions and of the Guild in particular (R. 279-281), and outside of meetings attacked the Guild (R. 282). At a later time Young told Schlichter that it would be easy to break the union by giving other employees higher wages than the editorial employees were getting, thus showing that the union was unnecessary in order to get higher wages (R. 377).

Helen Brichoux Kavalosky testified as follows: after the Guild had voted to admit members of non-editorial departments (R. 382), attempts were made by Young to force his department into a contract (R. 380-385). When Kavalosky accused Young of trying to form a company union (R. 384), he countered with an accusation that she was "getting outside advice" (R. 384). Young's efforts, however, were unsuccessful (R. 384).

In May, 1938, a strike was called by the Guild against the Citizen-News in protest over discharges. Kavalosky was on the picket-line. During the strike, Brandon saw her in a restaurant, and shouted at her:

> "Helen, you had better get out of here because I want to sit down and eat lunch. I won't eat with a striker" (R. 385-386).

Helen told of the efforts of Zuma Palmer, daughter of Palmer, to discourage her from joining the Guild "in view of all that the Judge had done for all of the editorial department and for me, that she thought it was very ungrateful of anyone to join the Guild" (R. 387-388).

Not one of the incidents in this entire narrative was contradicted or questioned by the respondent. It produced only one witness, Palmer, who contented himself with

testifying to the paper's financial condition in order to justify certain discharges, with which we are not here concerned.

The respondent's position is that at the editorial employees' meeting with Palmer, he expressed disappointment that he could not reach an agreement with the Guild (R. 89). The record fails to support this, but does show that Palmer upbraided the employees at the meeting by demanding:

> "What is the matter with you people? Don't you know what you want? Can't you make up your own minds? Do you prefer to have somebody in Washington or New York or some place dictate to you?" (R. 234)

The foregoing evidence, substantial and uncontradicted, permits, nay compels, the conclusion that the respondent, through Palmer and his supervisory employees, missed no opportunity or occasion to deride and ridicule the Guild, to attempt to undermine its usefulness, to destroy its existence. The Board's findings to this effect are, therefore, completely justified.

Case 9995

In this case the Board found that the respondent had discriminated in regard to the hire and tenure of employment of Leonard Lugoff, thus discouraging membership in the Guild (p. 111), and had violated Sec. 7 of the N.L.R.A. by interfering with, restraining and coercing its employees in the exercise of their rights to bargain collectively and to join labor organizations of their own choosing (R. 112).

Leonard Lugoff; his discharge and reinstatement in August, 1938

Lugoff was employed in the classified advertising department as an outside salesman. In October, 1937, he joined the Guild. In May, 1938, a strike occurred (R. 187), but Lugoff did not go out with his fellow union members. As a result he was dropped from membership (R. 187). In August, while the strike was still on (R. 188), he took a two week vacation (R. 187). Upon his return he was discharged (R. 187), but reinstated by Palmer on probation till January 1, 1939 (R. 191-193). The basis for this probationary reinstatement is important, as it bears directly upon Lugoff's final discharge on March 30, 1940.

Palmer testified that the reinstatement was based upon Lugoff's plea that, inasmuch as five union members were being reinstated under a strike settlement agreement pending a Labor Board decision, he should be accorded no worse treatment, as he had not joined the strikers (R. 142-145, 580-581). Young was present at this conversation (R. 189, 555-6, 579, 581), and corroborated Palmer (R. 555-6). Then, according to Palmer, he reinstated Lugoff "on probation till January 1, 1939" (R. 191-193, 581), and gave him a letter to that effect (Bd. ex. 16, R. 193). Upon receipt of the Labor Board's decision (case 9994) on March 28, 1940 (R. 577) holding that the five union members had not been discharged in violation of section 8 of the Act, two of the five (three having resigned previously) were discharged, as well as Lugoff on March 30, 1940 (R. 147-148). On the other hand, Young stated that the *only* reason for Lugoff's final discharge was his "lack of production" and "nothing else" (R. 347).

Lugoff's story is entirely different, of course. He says that in his August, 1938, reinstatement was based upon his plea that prior to his vacation he had incurred a $300 debt, upon the assurance of Tobin, his superior, that his job was safe, despite his failure to earn his guaranty (R. 188), and that his discharge was unfair (R. 189-190). Although Tobin denied that he had given Lugoff any assurance about his job, he admitted the conversation about the intended loan (R. 427); and did not deny that he made no reply when Lugoff accused him of first promising him that his job was secure and then firing him (R. 275).

At this point it should be noted that none of the five strikers, reinstated pursuant to the settlement agreement in August, 1938, was placed on probation, as was Lugoff. Only *he* received such a letter. Palmer himself admitted that he had not told Lugoff that he would be reinstated under the terms of the settlement agreement (R. 144).

These facts, plus Palmer's admissions, afforded the Board substantial evidence that Lugoff's reinstatement had nothing whatsoever to do with the strike settlement.

Lugoff's final discharge on March 30, 1940

Palmer insists that he discharged Lugoff only because the Board's order (case 9994) relieved him of the terms of the strike settlement agreement (R. 145). The evidence, as we have seen, does not support this. Young, however, places it on the ground of "unproductivity" and "nothing else" (R. 347). Is Young's story true, or is there still another reason—union activity?

Lugoff rejoined the Guild in February, 1939 (R. 195). Meanwhile his probationary period (Jan. 1, 1939) had come and gone, with no word from Palmer, Young or

Tobin (R. 194). He had every right to assume then that he had successfully passed the probationary period. Apparently he was right; as he kept his job for another year and a half.

Lugoff's complete record of earnings was put into evidence (pp. 174-6) together with a record of earnings for the 4 weeks immediately preceding March 30, 1940, of all the salesmen in his department (R. 205-8). These tables show that between May and August, 1938 (the months during the strike) Lugoff's earnings dropped sharply (R. 174). Between September and December, 1938, the probationary period, they rose substantially although not quite to the pre-strike level (R. 175). This was due in part at least, it can be fairly assumed, to a failure to regain advertisers lost through the strike (R. 167). Between January and June, 1939, his earnings remained on a par with those of his probationary period (R. 175-6). In July, 1939, through the efforts of Lugoff, all classified salesmen received a weekly guaranteed salary of $24 (R. 176, 199). From then until his discharge, March 30, 1940, Lugoff's earnings were just a shade under his previous earnings, except for the month of March itself when they rose sharply just before his discharge (R. 177). This appears by comparing the figures on page 177 with the figures on pages 205-208, which show that the figures on page 177 for the 4 weeks in March are incorrect.

Lugoff testified that during the entire period between July, 1939, to March, 1940, his earnings equalled or bettered his $24 guaranty only a few times (R. 199-200) but that he never was spoken to about it (R. 200, 213). He also testified, and the records bear him out (R. 201, 205-208) that in March, 1940, he was the second highest man in the department. *None of the four salesmen below him in productivity was discharged.*

Lugoff's retention beyond his probationary period shows that his productivity was satisfactory; as does the fact that he was able to persuade Tobin to establish a $24 minimum salary at a time when he was not earning that much. Above al, his March, 1940, earnings which were substantially higher than the preceding months' earnings, cast grave doubt on respondent's claim that he was discharged for failure to produce.

There is evidence by Tobin, that Lugoff was lazy (R. 430-460) and did not follow up leads given to him between August, 1939, and March, 1940. Yet, his earnings after August, 1939, were no lower than before.

Beginning with his re-entry into the Guild, Lugoff became very active seeking members and circulating petitions (R. 195). The only other Guild member in his department was Helen Brichoux (R. 195). In August, 1939, Frank Gilman, credit manager, warned Lugoff to cease his Guild activity or he would be out of a job (R. 235), and that the next Presidential election would result in the abolition of the N.L.R.B. (R. 235). Gilman was not called to deny this, nor was George Palmer, in whose hearing it was said (R. 237). About March 15, 1940, two weeks before his discharge, Lugoff circulated a union petition (R. 226) among all the employees of the classified department, and in the presence of Tobin (R. 228).

The respondent's attitude toward the Guild ever since the strike, is indicated clearly by Palmer's statements, that the Guild and the Board were out to destroy the Citizen-Union (R. 164-5), and that he (Palmer) would not post notices in accordance with the Board's order "until the Court orders us to do so."

Another incident, indicative of respondent's attitude toward the Guild, was a statement by George Palmer, son

of one of the owners, that it was a fact that the management would close the plant if the Guild did not act "reasonable" (R. 218-219). This was not denied.

In the face of all this very definite evidence, the Board found that Lugoff's discharge was discriminatory and due to his union activity. It is supported further by the failure of Tobin to follow his usual routine when he had decided to discharge some one (R. 236) and by the fact that Palmer himself—not Tobin as would be customary—discharged Lugoff (R. 236). His discharge notice was mailed 8 P. M. Saturday and received that night at 10 P. M. by special delivery, a fact which points to a sudden decision suddenly acted upon.

The Unfair Labor Practices

In addition to the incidents already discussed in relation to Lugoff, the uncontradicted testimony supports the Board's finding of unfair labor practices. The publisher was merely acting in accordance with his avowed policy of defiance of the Board and resulting defiance of the Wagner Act itself.

According to Patricia Killoran, a Guild member who participated in the strike, Young denounced her and "all of you" for "all the things that you have done" and coupled it with an unmistakable reference to the Guild (R. 356). On another occasion, Killoran circulated a petition in the composing room, which was designed to make peace between Palmer and the Typographical Union through the good offices of the Guild.[1] All she got for her pains

[1] Despite Palmer's profession of sympathy for labor unions (R. 165), it extended only to a point where it did not affect his business (R. 165). The typographers in his plant were unorganized. Killoran hoped to achieve Palmer's recognition of the Typographical Union so that the respondent would not lose one of its large printing contracts (R. 357).

was a rebuke from Swisher that she was "always trying to stir up trouble" (R. 358-9).

The record contains additional unrefuted testimony of many other active indications of anti-Guild feeling and expressions on the part of supervisory employees, such as the denial of "by-lines" after the strike, to those employees who had previously rated this honor (R. 420). This was done, said Swisher, because he felt that advertisers would be offended and alarmed at seeing stories signed by Guild members who had participated in the strike (R. 421). This excuse is flimsy indeed. It is felt that those incidents already listed are more than sufficient to justify a finding that the respondent engaged in unfair labor practices.

It is to be remembered, of course, that whether, upon all the evidence, this Court would have come to different conclusions does not in itself justify a reversal of the Board's orders. So long as there is substantial evidence to support the Board's orders, this Court is bound by the findings of fact. *Appalachian Electric Power Co.* v. *Labor Board,* 93 F. (2d) 985 (U.S.C.C.A., 4 Circ.).

However, in this case, the Court may not be concerned over such considerations. It is clear that this case presents a picture of flagrant violations and open defiance of the law. Court action is indicated to support the remedial decisions of the Board.

Conclusion

For the foregoing reasons, the Board's petitions for enforcement of its orders in both cases should be granted, and the respondent should be directed to cease and desist from unfair labor practices, reinstate Leonard Lugoff

with back pay, and post notices that it will refrain from engaging in the activities from which it has been ordered to cease and desist.

Respectfully submitted,

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